

FEDERAL COURT OF AUSTRALIA

**Minister for Immigration & Multicultural & Indigenous Affairs v Kodama
[2003] FCA 510**

**MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS
AFFAIRS v NOBUKO KODAMA
N 1385 of 2002**

**JACOBSON J
26 MAY 2003
SYDNEY**

**IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY**

N 1385 of 2002

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: MINISTER FOR IMMIGRATION & MULTICULTURAL &
 INDIGENOUS AFFAIRS
 APPELLANT**

**AND: NOBUKO KODAMA
 RESPONDENT**

JUDGE: JACOBSON J

DATE OF ORDER: 26 MAY 2003

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Magistrate be set aside, and that there be substituted an order that the application be dismissed with costs.
3. The respondent pay the appellant's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGE: JACOBSON J

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PLACE: SYDNEY

REASONS FOR JUDGMENT

Introduction

- 1 This is an appeal from a judgment of Driver FM delivered on 29 November 2002 declaring that a decision of the Migration Review Tribunal (“MRT”) made on 20 May 2002 was invalid and of no effect.
- 2 The MRT’s decision affirmed a decision of a delegate of the Minister given on 6 December 2000 that the respondent was not entitled to the grant of a spouse (migrant) (class BC) visa.
- 3 The respondent is a Japanese national. She applied for permanent residency in Australia in 1996 upon the basis that she was the spouse of Mr D R Filer (“the nominator”). She was not married to the nominator but the definition of “spouse” in the *Migration Regulations 1994* (Cth) (“the Regulations”) includes persons who are in a *de facto* relationship. The respondent claimed to be in a *de facto* relationship with the nominator.
- 4 The learned Magistrate found at [27] that the MRT failed to establish an essential jurisdictional fact because it set out in its decision the wrong paragraph of the definition of

“spouse”, namely the definition which applied to married persons rather than the paragraph which applied to persons in a *de facto* relationship. He found that this was sufficient to vitiate the decision of the MRT within the reasons advanced by the Full Court of the Federal Court in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 193 ALR 449 (“*NAAV*”).

5 The learned Magistrate also found at [19] – [20] that the respondent was denied procedural fairness because the MRT failed to direct her attention to all relevant criteria for the class of visa she was seeking. The criterion which was omitted was a paragraph of the Regulations which enables a person to meet the requirements where the spousal relationship has ceased as a result of domestic violence. However, Driver FM held that the denial of procedural fairness was not a ground of review in light of the decision in *NAAV*.

6 Three questions arise on the appeal. The first question is whether the Federal Magistrate was correct in finding that the MRT committed a jurisdictional error by referring to the wrong paragraph of the definition of “spouse”.

7 The second question is whether the MRT failed to exercise jurisdiction by failing to consider whether the criteria for the domestic violence exception contained in the Regulations were satisfied. This question was raised by way of a notice of contention.

8 The third question, also raised by way of notice of contention, is whether there was a denial of procedural fairness by reason of the failure of the MRT to direct the respondent’s attention to the provisions of the Regulations which enable an applicant to satisfy the necessary requirements where a relationship has ceased as a result of domestic violence.

The decision of the MRT

9 The delegate’s decision which was reviewed by the MRT proceeded upon the basis that the respondent’s application was made under Part 801 of Schedule 2 of the Regulations.

10 The MRT noted at [8] that in order to be granted a sub-class 801 visa, the applicant must satisfy the criteria stated in Clause 801.221 at the time of the decision.

11 The MRT set out at [8] the following parts of that clause as follows:-

“801.22 Criteria to be satisfied at time of decision

801.221 (1) The applicant meets the requirements of subclause (2), (3), (4), (5), (6) or (8).

(2) An applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a subclass 820 visa; and*
- (b) the applicant continues to be nominated for the grant of the subclass 801 visa by the nominating spouse; and*
- (c) the applicant is the spouse of the nominating spouse; and*
- (d) subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.”*

12 Although it was not referred to in the MRT’s decision, it is convenient to set out here the relevant part of sub-clause 6 of Clause 801.221 which deals with domestic violence. It is as follows:-

“(6) An applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a Subclass 820 visa; and*
 - (b) the applicant would meet the requirements of subclause (2) except that the relationship between the applicant and the nominating spouse has ceased; and*
 - (c) either or both of the following circumstances applies:*
 - (i) either or both of the following:*
 - (A) the applicant;*
 - (B) a dependent child of the nominating spouse or of the applicant or of both of them;*
- has suffered domestic violence committed by the nominating spouse;...”*

13 The MRT noted at [9] that the regulation required the applicant to be the spouse of the nominator. It set out the following portion of the definition of “spouse”:-

“1.15A

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) in a married relationship, as described in subregulation (1A); or*
- (b) in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised*

as valid for the purposes of the Act; and

- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.”*

14 The relevant paragraph of Regulation 1.15A which was omitted from the MRT’s decision was as follows:-

- “(2) Persons are in a de facto relationship if:*
 - (a) they:*
 - (i) are of opposite sexes; and*
 - (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
 - (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B(2) of the Marriage Act 1961; and*
 - (b) they are of full age, that is:*
 - (i) if either of the persons is domiciled in Australia – both of them have turned 18; or*
 - (ii) if neither of the persons is domiciled in Australia – both of them have turned 16; and*
 - (c) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis; ...”*

15 The MRT set out at [11] to [12] the respondent’s immigration history. Reference was made to her unsuccessful application for a spouse visa in 1996 and the grant of a temporary subclass 820 visa upon the basis that she was the spouse of the nominator.

16 It is evident that there was a lengthy delay between the date of the respondent’s application and the date of the delegate’s decision in December 2000. This seems to be explained by the failure of the nominator to respond to a series of letters sent by the Department to the

respondent requesting information to demonstrate that her relationship with the nominator was genuine and continuing. The MRT referred to this correspondence at [13]. Four unanswered letters were sent between June 1998 and August 2000. They included a letter dated 15 February 2000.

17 Although there was no reference to this in the MRT's decision, I pause here to mention that the Department's letter of 15 February 2000 also stated:-

"If the relationship on which your application was based is no longer continuing, there are three circumstances under which you may be eligible to be considered for the grant of permanent residence. These are as follows:-

- *If your spouse has died; or*
- ***If your relationship has ended and you were a proven victim of domestic violence in that relationship; or***
- *If you have custody or joint custody of any children in respect of whom your spouse has been granted joint custody or access, or in respect of whom your spouse is subject to a formal maintenance obligation."* (emphasis added)

18 Before setting out its findings, the MRT referred at [31] to the sort of evidence which it required from the respondent as notified to her in a letter of 3 April 2002. That letter included the following statement:-

"In reviewing your case, the Tribunal must assess whether you and your partner have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and whether the relationship between you and your partner is genuine and continuing. The Tribunal invites you to provide further information before or at the hearing that is relevant to these issues. Please see the attached sheet for examples of the type of evidence you could provide."

19 The attached sheet, which was referred to in the paragraph which I have quoted at [18], was headed "Evidence In Partner Cases". It referred to the circumstances to which the MRT would have regard including the financial and social aspects of the relationship. It set out a non-exhaustive list of the type of evidence which may be provided.

20 The MRT's reasons for affirming the delegate's decision were as follows:-

"32. Evidence commonly submitted would be statutory declarations from friends and family attesting to the genuine and continuing nature of the

relationship, evidence of financial dealings or utilities or residential leases in joint names. Evidence of personal correspondence such as Christmas cards addressed jointly. Not one of the pieces of evidence submitted to the Tribunal in advance of the hearing or at hearing included correspondence that was addressed to them jointly. There was no evidence indicating that the visa applicant and the nominator had been living in an exclusive genuine and continuing relationship for the past six and a half years. What concerns the Tribunal and substantially diminishes the credibility of both the nominator and the visa applicant is the fact the nominator failed to attend the hearing due to an undocumented illness that precluded him from coming along. This is despite the fact that he was given substantial notice of the hearing time and date. Attempts to contact him at home were unsuccessful as the telephone initially rang out indicating that no one was home and after the adjournment the telephone was engaged and remained that way for hours after the hearing.

33. There is insufficient written and oral testimony before the Tribunal which shows that the relationship between the visa applicant and the nominator is genuine and continuing and to the exclusion of all others. When the Department attempted to assess whether the relationship was genuine and continuing after two years, prior to making the decision that is the subject of this review, it sent out a number of requests to the visa applicant and the nominator for further information corroborating the relationship. This was sent to all known addresses and no response was received. Prior to conducting the review hearing the Tribunal requested evidence corroborating the genuine and continuing nature of the relationship which could be provided in advance of the hearing or at the hearing itself. The evidence provided at hearing by the visa applicant has not satisfied the Tribunal that the relationship between the visa applicant and the nominator is genuine and continuing and to the exclusion of all others.”

- 21 The conclusion which the MRT reached at [34] was that given the abovementioned findings, the MRT had no alternative but to affirm the decision.

Evidence in support of the denial of procedural fairness

- 22 The respondent filed an affidavit in the Federal Magistrates’ Court setting out her evidence in support of this claim.
- 23 The affidavit is short and I will set out the body of the affidavit in full, omitting formal parts, as follows:-

“1. I am the applicant in these proceedings

2. My relationship with (the nominator) broke down during the first half of 2002

3. *On 9 June 2002 after an assault on me by (the nominator) the Police attended and advised me to take out an Apprehended Violence Telephone Interim Order. Annexed hereto and marked with the letter "A" is a copy of that Order"*

24 The apprehended violence telephone interim order and the notice of penalty described the date of the assault as 9 June 2002.

The Decision of the Federal Magistrate

25 The principal submission of the respondent's solicitor was that the MRT had failed to consider the domestic violence exception contained in Clause 801.221(6) of the Regulations. This was said to constitute a failure to exercise jurisdiction under s 65 and/or s 353(2)(b) of the *Migration Act 1958* (Cth) ("the Act"). It was submitted (see at [18]) that the failure to draw the respondent's attention to the provisions of this paragraph of the Regulations misled the respondent as to the criteria which she needed to establish in order to obtain the visa.

26 The learned Magistrate observed at [19] that the respondent was given incomplete information on 3 April 2002 when the MRT sent her the information sheet to which I referred at [18] above. The Magistrate went on to say in this paragraph of his judgment that:-

"She was put on notice two years previously by the Department that she could raise issues of domestic violence and relationship breakdown but it is understandable that she may have forgotten about that after two years. In addition, it is understandable and reasonable for an applicant, having been advised by the MRT as to what issues are considered relevant, to limit herself to those issues. The failure by the MRT to direct the applicant's attention to all possible relevant criteria relating to the class of visa she was seeking meant that the applicant was not properly informed of the case she had to make. The provision of complete information was not a difficult thing to do. The Department had done it properly previously twice. There was no obligation on the MRT to advise the applicant of what she needed to establish to succeed in her review application. However, having elected to provide advice, the advice given should have been accurate and complete. It was not complete. The subsequent hearing before the MRT was, because of the failure of the MRT to properly inform the applicant of the case she had to make, procedurally unfair. However, in the light of the privative clause and the decision of the Full Federal Court in NAAV, that is no longer an available ground of review."

- 27 The statement in the first sentence of this passage that the respondent was put on notice two years previously was a reference to the letter of 15 February 2000 to which I referred at [17] above. The statement that the Department had “done it properly previously twice” was a reference to the letter of 15 February 2000 and to a letter of 11 June 1997 which was in similar terms.
- 28 The learned Magistrate noted at [20] that there was nothing before the MRT which would have reasonably required it to make enquiries as to whether the domestic violence exception in Clause 801.221(6) had any application. However, Driver FM stated that the reason for this was, on the respondent’s evidence in the Federal Magistrates’ Court, that she was not properly informed of the case she had to make.
- 29 The Magistrate went on to observe that the respondent was self-represented before the MRT and that her self-represented status underscored the need to ensure that she was given complete advice as to what she needed to establish before the MRT (see at [20]). However, the Magistrate found at [20] that this did not demonstrate any lack of *bona fides* on the part of the MRT in the exercise of its powers. Accordingly, under the views stated in *NAAV*, the decision was immune from review on the procedural fairness ground.
- 30 At para [22] Driver FM acknowledged that there was no general obligation on the MRT to make enquiries at large as to the possibility of domestic violence. Thus, the failure of the MRT to have regard to sub-paragraph (6) of Clause 801.221 was “explicable and justifiable” because “there was nothing before the MRT to indicate that that paragraph might be relevant”; see at [22].
- 31 Accordingly, the Magistrate found that the MRT did not breach s 65 of the Act in failing to have regard to criteria which were not put to it (see at [22]). Also, the Magistrate found at [23] that, for the same reason, s 353(2)(b) was not breached.
- 32 However, Driver FM went on at [26] to [27] to consider whether the MRT had failed to have regard to the definition of *de facto* spouse. He did so upon the basis that a failure to do so would be a jurisdictional error which was not protected by the privative clause.
- 33 The reasons why the learned Magistrate found that there was a jurisdictional error are to be

found in the following passage of his judgment at [27]:-

“It is unclear whether the MRT in fact had regard to the correct definition because, in material respects, the definitions operated in much the same way. The MRT in its reasons referred to elements of the definition of “spouse” that are common to both a married spouse and a de facto spouse. However, the definition of “de facto spouse” also contains unique elements. None of these were referred to by the MRT in its reasons. I am entitled to conclude, on the basis that the MRT referred expressly to the irrelevant definition of persons in a married relationship, and throughout its reasons dealt only with elements referable to that definition, that the MRT failed to have any regard to the relevant definition. I regard that as a fundamental failure to establish a jurisdictional fact, amounting to a failure to satisfy a jurisdictional pre-requisite.”

Whether the failure of the MRT to set out Regulation 1.15A(2) was a jurisdictional error

34 In my view, on a fair reading of the whole of the MRT’s decision, it cannot be said that the failure to refer to Regulation 1.15A(2) in any way affected the validity of the reasoning process which the MRT adopted; see *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, 291.

35 This is because the salient parts of the definition of married persons or persons in a *de facto* relationship in Regulation 1.15A(1) and (2) are identical. Sub-paragraphs 1A(b)(ii) and 2(c)(ii) each required the Minister to be satisfied that the relationship between the parties was genuine and continuing. That was the question which the MRT addressed and which it found adversely to the respondent.

36 It is true, as the learned Magistrate noted, that the definition of *de facto* spouse contains unique elements but those elements were not in issue in the proceeding before the MRT. Thus, any failure to refer to the factors set out in Regulation 1.15A(2)(a)(i) – (iii) and (b)(i) – (ii), which contain the unique requirements, cannot amount to error.

37 The citation of the wrong paragraph of the definition was regrettable. However, there is nothing in the reasons of the MRT to suggest that it approached the matter with the wrong definition in mind. Indeed, the substance of the reasons indicate that the MRT applied the correct definition even though it referred to the wrong paragraph number.

38 It follows, in my opinion, that the learned Magistrate erred in finding that the MRT failed to

establish a necessary jurisdictional fact.

Whether the MRT committed jurisdictional error by failing to consider Regulation 801.822(6)

39 As Driver FM observed, there was nothing before the MRT which could reasonably have required it to make enquiries as to whether the operation of Clause 801.822(6) was enlivened.

40 In those circumstances, I do not see that there was any obligation on the MRT to consider whether the criteria stated in Regulation 801.822(6) were satisfied. There is nothing in s 65 of the Act or Clause 801.822 of the Regulations which required the MRT to reach a state of satisfaction about criteria which were not put to it.

41 As Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 195 ALR 1 (“S134”) at [31]:-

“The tribunal was required to review the decision of the delegate who, in turn, had been required (by s 47) to consider the application and the criteria which that application had to meet, not the criteria for an application, never made, which might have been put on another basis.”

Here the criteria set forth in sub-clauses (2), (3), (4), (5), (6) and (8) of Clause 801.822 were criteria for alternative ways in which the requirements of Clause 801.822 could be met. In *S134*, the criteria expressed in the Regulations were stated in disjunctive terms. The observations made by Gleeson CJ at [32] that there was no obligation imposed by s 65(1) of the Act to reach a state of satisfaction in respect of criteria which the prosecutors did not advance are apt in the present case. See also at [90] (per Gaudron and Kirby JJ).

Whether there was a denial of procedural fairness

42 The Federal Magistrate found that the denial of procedural fairness consisted of the failure to inform the respondent of the case she had to make. Although he did not say so in express terms, the effect of this was that he proceeded upon the basis that she was denied the opportunity to put the case she wished to make to the MRT.

43 It is well established that one aspect of the obligation to provide procedural fairness is that the applicant should have a fair opportunity to put his or her whole case to the decision-maker; see eg *Re Minister for Immigration & Multicultural Affairs; Ex parte Miah* (2001) 206 CLR

57 at [99] per Gaudron J; see also *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 at [25] per Gleeson CJ.

44 However, there is authority for the proposition that the rules of procedural fairness do not oblige a decision-maker to make the case for an applicant; see *Luu v Renevier* (1989) 91 ALR 39 at 45 (per Wilcox J). This seems to me to indicate that there can be no obligation on the part of a decision-maker to supply an applicant with a list of criteria which he or she must meet to make out a case which is different from the nature of the claim which an applicant has put forward.

45 Indeed, the observations of Gleeson CJ and Gaudron and Kirby JJ in *S134* seem to me to be inconsistent with an obligation on the part of the decision-maker to notify an applicant of an alternative claim of which no suggestion has been made in the application.

46 Thus, in order to make good the proposition that the respondent was denied procedural fairness, it was incumbent upon her to adduce evidence in her application to the Federal Magistrate which established that she lost an opportunity to put a claim and that this came about because she was misled by the procedures adopted by the MRT.

47 This seems to me to follow from the conclusion that there was no independent obligation on the MRT to provide her with information necessary for a claim that the respondent herself had not sought to make. Once this is appreciated, the only way in which an obligation of procedural fairness can be enlivened is by some misleading conduct on the part of the MRT (albeit unwittingly) which caused an applicant to lose an opportunity to put a case which he or she would otherwise have sought to make before the decision-maker.

48 Although his remarks were made in a different context, the following words of Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at [37] are apt:-

“A common form of detriment suffered where a decision-maker has failed to take a procedural step is loss of an opportunity to make representations. ... A particular example of such detriment is a case where the statement of intention has been relied upon and, acting on the faith of it, a person has refrained from putting material before a decision-maker. In a case of that particular kind, it is the existence of a subjective expectation, and reliance, that results in unfairness. Fairness is not an abstract concept. It is

essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”

49 Also, notwithstanding once again that his observations were made in relation to the denial of an opportunity to deal with a case put against an applicant, Kirby J expressed similar views in *Re Minister for Immigration & Multicultural Affairs; Ex parte “A”* (2001) 185 ALR 489 at [54]. There, his Honour said that in default of some indication as to the nature of the opportunity which an applicant says that he or she was denied and the presentation of evidence that would constitute an arguable case that might result in a different outcome, any omission by the Tribunal to disclose the information (assuming such disclosure to be obligatory) was not shown to be material in the case.

50 Here, the respondent’s evidence in support of her claim of procedural fairness was deficient in two respects. First, the opportunity which the respondent claims to have lost was an opportunity to put before the MRT on 29 April 2002 a claim which would have brought her within the domestic violence exception contained in Clause 801.822(6) of the Regulations. But the only act of domestic violence, unfortunate though it was, which was referred to in her affidavit was the assault which took place on 9 June 2002 more than a month after the hearing.

51 Mr Turner, who appeared for the respondent, submitted that it was open to me to infer from the respondent’s affidavit that there may have been acts of violence before 9 June 2002. He pointed to the respondent’s statement in paragraph 2 of her affidavit that the relationship with the nominator broke down “during the first half of 2002” and to the assault which occurred on 9 June 2002 for which the nominator was convicted.

52 Mr Turner submitted that although the affidavit did not say so expressly, the relationship must have broken down over a period of time in the first half of the year and that serious acts of violence such as the assault which took place in June are not likely to be isolated incidents but are more likely to have been part of a pattern of behaviour which had its inception some time prior to the hearing before the MRT.

53 I cannot accept this submission because it invites speculation as to what may have happened in the critical period before 29 April 2002. The affidavit is entirely silent as to any act of domestic violence during that period.

- 54 Although it was unnecessary for the evidence to have been given chapter and verse of any incident of domestic violence, it was necessary for the respondent to put evidence before the Magistrate which gave an indication that there was at least an arguable case that the relationship had ceased before 29 April 2002 due to or in combination with domestic violence which had occurred before that date.
- 55 It was also necessary for the respondent to comply with the special provisions relating to domestic violence in Division 1.5 of Part 1 of the Regulations. Those provisions required, *inter alia*, a statutory declaration from the respondent setting out her evidence and two statutory declarations from medical practitioners or other competent persons as defined in Regulation 1.21; see Regulations 1.23(g) and 1.24. No such evidence was adduced.
- 56 I should add that the affidavit is ambiguous as to whether the relationship with the nominator had in fact ceased as at 29 April 2002 but it unnecessary for me to consider whether this was a further deficiency in the evidence adduced in support of the claim of denial of procedural fairness.
- 57 Even if the respondent was not required to put evidence before the Federal Magistrate of the nature of the opportunity which she lost, the evidence in her affidavit establishes that any breach of the rules of procedural fairness made no difference to the outcome of the proceeding; see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [4] per Gleeson CJ; at [56] – [60], [79] – [81] per Gaudron and Gummow JJ; at [104] per McHugh J; at [172] per Kirby J and at [211] per Callinan J. See also *Quitlong v Australian Postal Corporation* [2003] FCA 359 at [12] per Gyles J.
- 58 The second deficiency in the respondent's evidence was that there was no evidence that she was misled or that she relied upon the information sheet as a reason for not putting forward her claim of domestic violence.
- 59 The learned Federal Magistrate recorded at [19] that the respondent asserted that she was deterred from saying anything about domestic violence because of the information she had been given by the MRT in the information sheet. But that assertion was no more than a submission made from the bar table because there was nothing in the respondent's affidavit to that effect.

- 60 It is true, as Driver FM observed, that the Department had informed the respondent two years earlier of the criteria for the domestic violence exception. However, I doubt that the “advice” given by the Department thereby imposed an obligation on the MRT to take steps to ensure that she was again apprised of that information.
- 61 The Federal Magistrate’s remark that the MRT, having elected to provide advice to the respondent in its letter of 3 April 2002, should have given complete advice seems to me to overlook the fact that the respondent did not put to the MRT any facts which would have alerted it to the possibility that the respondent wished to bring herself within the domestic violence exception.
- 62 I do not think that the respondent’s lack of legal representation at the hearing before the MRT can be said to have imposed an obligation on the MRT which it did not otherwise have to alert it to the possibility of an alternative claim in the absence of any hint of such a claim by the respondent.
- 63 Even if I am wrong in this, it seems to me that a finding of a denial of procedural fairness could not have been made good without evidence from the respondent that she had been misled by the reference to the domestic violence exception in the correspondence from the Department and the omission of the MRT to refer to it in the letter of 3 April 2002.
- 64 Mr Turner submitted that, putting the respondent’s case at its highest, he could do no more than submit that the respondent may have been deprived of an opportunity to put a claim of domestic violence. I do not think he put this submission unfairly but I reject it for the reasons I have given above.

Orders

- 65 It follows that I propose to allow the appeal. I will make the orders set out in paragraphs 3(a), (b) and (c) of the notice of appeal.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment

herein of the Honourable Justice
Jacobson.

Associate:

Date: 26 May 2003

Counsel for the Applicant: Mr T Reilly

Solicitor for the Applicant: Australian Government Solicitor

Counsel for the Respondent: Mr R Turner

Solicitor for the Respondent: Yandell Wright Stell

Date of Hearing: 11 April 2003

Date of Judgment: 26 May 2003